Jurisdictional Statement

Supreme Court, U.S.
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81-1782

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. ———

THE CITY OF VIRGINIA and LEWIS A. McMILLAN, MRS. JOYCE FLEMING, RAYNOLD LAHTI, FRED TELLER, VIRGINIA MUNICIPAL HOSPITAL COMMISSION, and NORMAN KAYE, Virginia Municipal Hospital Administrator,

Defendants-Appellants,

vs.

GEORGE W. NYBERG, NANCY R. NYBERG, FERN ARPI, WILLIAM A. ARPI, RACHEL ARPI, DR. CHARLES J. MOCK, DR. CHARLES A. TIETZ, MELODIE J. WILSON, JAMES E. WILLIAMS, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees.

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

(a) Questions Presented

1. Do *Doe v. Bolton*, 410 U.S. 179 (1973), and *Roe v. Wade*, 410 U.S. 113 (1973), require that every public hospital make its facilities available for non-therapeutic abortions?

2. Is the decision of the United States Court of Appeals, for the Eighth Circuit, in the instant case, *Nyberg v. City of Virginia*, 667 F.2d 754 (8th Cir. 1982), in direct conflict with this Court's decision in *Poelker v. Doe*, 432 U.S. 519 (1977), as amplified in *Maher v. Roe*, 432 U.S. 464 (1977)?

3. Are the following statutes of the state of Minnesota unconstitutional:

Minnesota Statutes, §145.42:

> Subd. 1. No physician, nurse, or other person who refuses to perform or assist in the performance of an abortion, and no hospital that refuses to permit the performance of an abortion upon its premises, shall be liable to any person for damages allegedly arising from the refusal.
>
> Subd. 2. No physician, nurse, or other person who refuses to perform or assist in the performance of an abortion shall, because of that refusal, be dismissed, suspended, demoted, or otherwise prejudiced or damaged by a hospital with which he is affiliated or by which he is employed.

Minnesota Statutes, §145.414:

> No person and no hospital or institution shall be coerced or discriminated against in any manner because

of a refusal to perform, accommodate, assist or submit to an abortion for any reason.?

4. Is a resolution of a municipal hospital prohibiting abortions except when required to save the life of the mother constitutionally impermissible?

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(d) Opinions Below

(i) *Nyberg I*

The first opinion of the United States District Court, District of Minnesota, is reported at 361 F.Supp. 932 (D.Minn. 1973). The first opinion of the United States Court of Appeals for the Eighth Circuit which affirmed the District Court's order is reported at 495 F.2d 1342

(8th Cir. 1974). Heaney and Gibson, JJ., dissented from a denial of a petition for rehearing en banc: 495 F.2d 1347 (8th Cir. 1974). An appeal was dismissed and certiorari denied by this Court, White, J., dissenting: 419 U.S. 891 (1974).

(ii) *Nyberg II*

The second opinion of the District Court has not been reported. A copy of this opinion is annexed hereto as Appendix A at pp. 1-7. The second opinion of the Court of Appeals which affirmed the District Court's order is annexed hereto as Appendix B at pp. 8-20 and is reported at 667 F.2d 754 (8th Cir. 1982), Heaney, J., dissenting; petition for rehearing en banc denied, Heaney, Henley, and Arnold, JJ., dissenting.

(e) Grounds upon Which Jurisdiction Is Invoked

(i) Nature of Proceeding

This is an action for declaratory and injunctive relief in which the plaintiffs sought to have a rule of the defendant municipal hospital (which denied the use of its facilities for abortions except where the mother's life is in danger) declared unconstitutional, and to enjoin the hospital to require it to make its facilities available to all persons seeking abortions for whatever reason. Plaintiffs claimed federal jurisdiction pursuant to 42 U.S.C. §§1981, 1983, 1985, and 28 U.S.C. §§2201, 2202.

(ii) Relevant Dates

Judgment of U. S. Court of Appeals, Eighth Circuit: January 11, 1982.

Order Denying Rehearing En Banc: February 10, 1982.

Notice of Appeal: March 19, 1982; filed U. S. Court of Appeals, Eighth Circuit: March 23, 1982.

(iii) Jurisdictional Basis

The statutory provision believed to confer on this Court jurisdiction of the appeal is 28 U.S.C. §1254(2), and, alternatively, 28 U.S.C. §1254(1) and §2103. Additionally, it is believed that the following cases sustain jurisdiction: *Poelker v. Doe,* 432 U.S. 519 (1977), and *Maher v. Roe,* 432 U.S. 464 (1977).

(f) Provisions Involved in Case

Virginia Municipal Hospital Resolution 2606 provides that abortions "will only be permitted when required to save the life of the mother." This resolution was adopted pursuant to:

Minnesota Statutes §145.414:

> No person and no hospital or institution shall be coerced, held liable or discriminated against in any manner because of a refusal to perform, accommodate, assist or submit to an abortion for any reason.

Minnesota Statutes §145.42:

> Subdivision 1. No physician, nurse, or other person who refuses to perform or assist in the performance of an abortion, and no hospital that refuses to permit the performance of an abortion upon its premises, shall be liable to any person for damages allegedly arising from the refusal.
>
> Subd. 2. No physician, nurse, or other person who refuses to perform or assist in the performance of an abortion shall, because of that refusal, be dismissed, suspended, demoted, or otherwise prejudiced or dam-

aged by a hospital with which he is affiliated or by which he is employed.

The Court of Appeals held that the above regulation "constitutes an undue burden on access to abortion" and, therefore, is unconstitutional pursuant to *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973).[1]

(g) Statement of the Case

Originally, this action was brought in 1973 in the name[2] of some citizens of the City of Virginia, Minnesota, seeking to have a regulation adopted by the Virginia Municipal Hospital Commission declared unconstitutional and to enjoin the city from enforcing the regulation. In essence, the regulation forbade the performance of abortions in the hospital except to save the life of the mother. On the authority of *Roe v. Wade*, 410 U.S. 117 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), the U. S. District Court held the regulation unconstitutional and enjoined its enforcement, although there was no express language in either case which mandated that result.[3] The Court of Appeals affirmed. *Nyberg v. City of Virginia*, 361 F.Supp. 932 (D.Minn. 1973), aff'd, 495 F.2d 1342 (8th Cir. 1974): *Nyberg I*.

In the following years, this Court has had an opportunity in a number of cases to amplify the *Wade* and *Bolton* opin-

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[1]Although the issue of the constitutional validity of the Minnesota Statutes was fully argued in the Court of Appeals in *Nyberg I*, the Court ignored them in its opinion. However, the effect of the Court's opinion is to hold the statutes unconstitutional. Later, the Court expressly struck down Minn. Sat. §145.414, *supra*, in *Hodgson v. Lawson*, 542 F.2d 1350 (8th Cir. 1976), relying on *Nyberg I* as authority for doing so.

[2]The Civil Liberties Union people appear to be the prime movers in this litigation.

[3]As a matter of fact, this Court in *Doe v. Bolton*, 410 U.S. 172, 197-98 (1973), declined to strike down a Georgia statute which provided that a "hospital is free not to admit a patient for abortion."

ions by identifying the perimeters of those opinions in areas of abortion law not considered in those opinions. Then, in 1977, this Court had the opportunity to consider the area of abortion law which is involved in the instant case. In *Poelker v. Doe*, 432 U.S. 519 (1977), this Court reversed an Eighth Circuit decision requiring St. Louis, Missouri, municipal hospitals to do exactly what the injunction requires the Virginia Municipal Hospital to do in the instant case. Reading *Poelker* together with its companion case, *Maher v. Roe*, 432 U.S. 464 (1977), and with the subsequent case of *Harris v. McRae*, 448 U.S. 297 (1980) and *Williams v. Zbarraz*, 448 U.S. 358 (1980), the City of Virginia concluded that the assumed constitutional basis for *Nyberg I* simply did not exist and sought appropriate relief. The District Court refused to vacate (on rather obtuse grounds) an injunction hallowed by the Court of Appeals (see Appendix A); and a divided Court of Appeals refused to budge from the philosophy adopted by it in *Nyberg I*. *Nyberg v. City of Virginia*, 667 F.2d 754 (8th Cir. 1982): *Nyberg II*. The result, as succinctly stated in the dissent in *Nyberg II*, is that—

> The City of St. Louis can prohibit all nontherapeutic abortions, either paid or nonpaid, from being performed in its publicly owned hospital while the City of Virginia cannot. This is an intolerable situation.

667 F.2d at 760.

The constitutional issues in the instant case were raised in the complaint and were the only matters litigated throughout *Nyberg I* and *Nyberg II*.

(h) Substantiality of Federal Questions

The apparent conflict in the holdings in *Poelker v. Doe, supra,* and *Nyberg II* has created a truly intolerable situation. The same state-action (whether by cities, counties, or States) in respect to public hospitals is permitted by the former case and forbidden by the latter case. That which is constitutionally permissible is constitutionally impermissible. No one now can know what may properly be done by a public body in this area of the law. An absolute clarification of the situation is of vital importance to all concerned. Such clarification is not only warranted, it is virtually mandated, by the conflicting state of the law.

Respectfully submitted,

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Appendix A

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION

GEORGE W. NYBERG, NANCY R. NYBERG, FERN ARPI, WILLIAM A. ARPI, DR. CHARLES J. MOCK, DR. CHARLES A. TIETZ, MELODIE J. WILSON, JAMES E. WILLIAMS, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

THE CITY OF VIRGINIA, LEWIS A. McMILLAN, MRS. JOYCE FLEMING, RAYNOLD LAHTI, FRED TELLER, JOHN DOIG, VIRGINIA MUNICIPAL HOSPITAL COMMISSION, and NORMAN KAYE, Virginia Municipal Hospital Administrator,

Defendants.

MEMORANDUM ORDER

5-73 Civ. 72

INTRODUCTION

Defendants seek an order of this court vacating the August 10, 1973 injunction of this court issued by the late Judge Philip Neville. That injunction permanently restrained defendants from enforcing a resolution of the Virginia Hospital Commission prohibiting the use of the Vir-

ginia Municipal Hospital for all abortions except those necessary to preserve the life of the mother. Plaintiffs oppose the motion on the grounds that defendants have failed to show sufficient change in conditions or law to justify relieving defendants of the operation of the injunction.

DISCUSSION

Rule §60 (b) (5) of the Fed. R. Civ. P. provides that a court may relieve a party from an order if it finds that it is "no longer equitable that the judgment should have prospective application." This rule requires a change in the circumstances (conditions) that make continued enforcement inequitable. *DeFillippis v. United States,* 567 F.2d 341, 344 (7th Cir. 1977). The change in circumstances must entail a change in law or fact, but need not entail both. As Mr. Justice Harlan stated in *System Federation No. 91, Railway Employees' Department, AFL-CIO v. Wright,* 364 U.S. 642, 647 (1960).

> There is also no dispute but that a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, *whether of law or fact,* obtained at the time of its issuance have changed, or new ones have since arisen. (Emphasis added.)

In addition to showing a change in circumstances, defendants have a heavy burden to show how continued enforcement of the injunction would constitute a grievous wrong. *DeFillippis* at 344. In *United States v. Swift & Co.,* 286 U.S. 106, 119, (1932), Mr. Justice Cardozo stated:

> No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression. Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed. . . .

It is the opinion of this court that the defendants have not met their burden to prove sufficient change in the law or grievous wrong.

Defendants cite four recent Supreme Court cases in support of their contention that the law has changed sufficiently to vacate the injunction: *Poelker v. Doe*, 432 U.S. 519 (1977), *Maher v. Roe*, 432 U.S. 464 (1977), *Harris McRae*, 48 Law Week 494 (June 30, 1980), and *Williams v. Zbaraz*, 48 Law Week 4941 (June 30, 1980). *Maher*, *McRae* and *Zbaraz* were all three funding cases. *Maher* dealt with a state's failure to fund non-therapeudic abortions. *McRae* dealt with the constitutionality of the Hyde amendment which provided that federal funding would only be provided for abortions for the indigent in cases necessary to save the life of the mother or in cases of promptly reported rape or incest. *Zbaraz* dealt with a statute prohibiting the use of state medical assistance for all abortions except those necessary to save the life of the woman seeking the abortion. In all three cases, the statutes were upheld. The test followed in these cases was whether the government created an unduly burdensome interference with the woman's freedom to decide whether to terminate her pregnancy. *Maher* at 473-4. The first element of the test requires that the interference or obstacle be one of

governmental creation. The rationale for the decisions in *Maher, McRae,* and *Zbaraz* was a determination by the court that any obstacle created for an indigent woman by the denial of government funds for abortions was not created by the government, but by the indigency of the woman itself. The Supreme Court held that the government need not remove obstacles not of its own creation. *McRae* at 4946.

In constrast to the funding cases above, *Poelker v. Doe, supra,* like the case before us, is a facility case. In *Poelker,* an indigent woman sought unsuccessfully to obtain a non-therapeudic abortion at one of two city-owned public hospitals in St. Louis, Missouri. The City of St. Louis had a policy directive prohibiting abortions in city hospitals except in cases where threat of grave physiological injury or death to the mother existed. The hospital was staffed with doctors who were graduates of a Jesuit school of medicine opposed to abortion. The court ruled that the policy directive and staffing procedure were not unconstitutional. The court, at 521, compared the *Poelker* situation to the one in *Maher* and held that the Constitution does not forbid a state or city, as a policy choice, pursuant to democratic processes, from expressing a preference for normal childbirth over non-therapeudic abortion.

The fact situation in *Poelker* differs from the fact situation in the present case in two important respects. In *Poelker,* as in the funding cases, indigency was the only obstacle to abortion. There were numerous private facilities in St. Louis that performed abortions, and the government in no way restricted a woman's right to obtain an abortion at one of those facilities. The only factor that would have prevented a woman from obtaining an abortion at a private

facility would have been lack of funds, and the court in *Maher* and progeny, as indicated above, had decided that indigency was an obstacle not of the government's creation. By contrast, in the present case, indigency is not the primary obstacle that would prevent a woman in Virginia from obtaining an abortion. In Virginia, Minnesota, the public hospital is the *only* hospital available. By prohibiting the use of that sole facility for abortions, the government is, in effect, requiring a woman to go to another community to obtain an abortion, and in so doing is creating an obstacle to the woman's freedom to decide whether to terminate her pregnancy that is independent of the woman's ability to pay.

The second element in the *Maher* test above is whether the government interference is unduly burdensome. The Supreme Court recognized that a government-created obstacle need not be absolute to be impermissible. *Maher* at 473. If a woman in Virginia wanted an abortion, she would have to travel to Duluth—63 miles away—or to the Twin Cities—over 200 miles away—to find a facility for it. Having to make arrangements for travel, and finding a facility that would perform the procedure in a locale with which the woman is not familiar, is much more burdensome than going to another facility in the same locale, as would be the situation in St. Louis. In addition, physicians practicing in Virginia would be deprived of the opportunity to perform the procedure on their own patients, even though it is they who would be in the best position, based on familiarity with the patients' backgrounds and needs, to exercise the professional judgment necessary to determine whether abortion in particular cases would be advisable. This relates to the second significant distinction between

this case and *Poelker*—that of the availability of medical personnel.

In *Poelker* there were no doctors willing to perform abortions. By contrast, in this case it was the doctors who sued for the right to perform abortions in the Virginia Municipal Hospital. In this case, the court was not looking directly at the rights of women to secure abortions, since there were no pregnant plaintiffs in the suit who would have had standing. It was from the point of view of the physicians that this case was decided. The late Judge Neville relied on the proposition in *Y.W.C.A. v. Kugler*, 342 F. Supp. 1048 (D. N.J. 1972) that physicians have a right to "freely practice medicine according to the highest medical standard" without arbitrary outside restraints and controls, a right this court determined, that is inextricably bound up with the privacy rights of the women who seek abortions. Judge Neville also recognized the economic interest of the physician plaintiffs in providing abortion services as a portion of their livelihoods and stated that a deprivation of this opportunity would be "tantamount to a denial of due process guaranteed by the Fourteenth Amendment." None of the cases cited by defendants in support of their motion to vacate address the due process rights of physicians who might be denied the opportunity to perform abortions, were this court to grant the motion.

Defendants also have failed to show how continued enforcement of the injunction would constitute a grievous wrong. In its order, this court required only that "facilities at this public institution be provided for abortion services for those doctors and ther women patients who have a right to them and request them." The hospital was *not* required to set up procedures to provide abortion services in

the absence of a doctor's request. It has also not been required to follow detailed procedures set out by the corut.

CONCLUSION

Based upon the foregoing, it is the court's finding that no reason justifies recission of the order of this court dated August 10, 1973, therefore,

IT IS ORDERED That defendants' motion to vacate the court's order of August 10, 1973 is denied.

Dated: November 10, 1980.

/s/ DONALD D. ALSOP
Donald D. Alsop
United States District Judge

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-2132

George W. Nyberg, Nancy R. Nyberg, Fern Arpi, William A. Arpi, Rachel Arpi, Dr. Charles J. Mock, Dr. Charles A. Tietz, Melodie J. Wilson, James E. Williams on behalf of themselves and all others similarly situated,

Appellees,

vs.

The City of Virginia and Lewis A. McMillan, Mrs. Joyce Fleming, Raynold Lahti, Fred Teller, Virginia Municipal Hospital Commission and Norman Kaye, Virginia Municipal Hospital Administrator,

Appellants.

Appeal from the United States District Court
for the District of Minnesota.

Submitted: October 14, 1981
Filed: January 11, 1982

Before LAY, Chief Judge, Heaney, Circuit Judge, and HUNTER,* Senior District Judge.

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*Elmo B. Hunter, Senior District Judge, Western District of Missouri, sitting by designation.

LAY, Chief Judge.

The sole issue presented by this appeal is whether the district court erred in refusing to vacate an earlier injunction entered by the federal district court against the Hospital Commission of the City of Virginia from implementing a resolution prohibiting staff doctors from using the facilities of the Virginia Municipal Hospital for any abortions except for those required to "save the life of the mother."

The earlier injunction was entered in 1973. *Nyberg v. City of Virginia*, 361 F. Supp. 932 (D. Minn. 1973), *aff'd*, 495 F.2d 1342 (8th Cir. 1974), *rehearing en banc denied*, 495 F.2d 1347 (8th Cir. 1974), (Gibson and Heaney, JJ., dissenting), *cert. denied*, 419 U.S. 891 (1974) *(Nyberg I)*. Defendants in the original action (hereinafter the City) now claim that recent developments relating to the constitutional restriction on abortions have changed the constitutional bases relied on in *Nyberg I*. They urge that they are now entitled to equitable relief under Fed. R. Civ. P. 60 (b) (5) and (6). We must respectfully disagree; we affirm the decision of the district court.

Plaintiffs Mock and Tietz are physicians and staff members at the Virginia Municipal Hospital. The hospital is operated by the City of Virginia, Minnesota, and is governed by the Hospital Commission. On February 5, 1973, the Hospital Commission attempted to proscribe by resolution the use of hospital facilities for all abortions except for those "required to save the life of the mother." Plaintiffs sought relief alleging infringement of their constitutional rights. The late Honorable Philip Neville, United States District Court Judge, entered an order enjoining defendants from implementing the resolution. The injunction requires the hospital facilities to be made available to any duly li-

censed physician for the performance of abortions within and subject to the rules and principles stated in *Roe v. Wade,* 410 U.S. 113, 164 (1973). On appeal, this court held the resolution unconstitutional and affirmed the district court's opinion. *Nyberg I, supra.*

On August 13, 1980, defendants moved the district court for an order to vacate the injunction, pursuant to Fed. R. Civ. P. 60(b)5) and (6), on the grounds that a change in law since the entry of judgment made prospective application of the injunction no longer equitable. The district court, the Honorable Donald D. Alsop presiding, held that defendants failed both to show a change in circumstances and to show how continued enforcement of the injunction would constitute a grievous wrong. The City appealed from this order.

Rule 60(b)(5).

Fed. R. Civ. P. 60(b)(5) provides that a court may relieve a party from an order if it finds that it is "no longer equitable that the judgment should have prospective application." A change in factual or legal circumstances may make continued enforcement inequitable. *System Federation No. 91, Railway Employees' Dep't AFL-CIO v. Wright,* 364 U.S. 642, 647 (1961).

The district court held that the City must prove both change in the law and continued enforcement of the injunction would constitute a grievous wrong. The City agrees it has the burden to show change in the law. The City argues that where there is a material change in the law such that the constitutional basis for the injunction no longer exists, the injunction is then per se inequitable and theer is no need to demonstrate grievous wrong. Because

we have determined that the cases relied upon by the City have not worked a sufficient change in controlling law, we do not reach the question whether the City must also show that continued enforcement of the injunction would constitute a grievous wrong.

Merits.

The City contends that one question not explicitly answered in *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973) was whether a city could prohibit staff physicians from performing abortions for paying patients at the sole hospital in the community. In *Nyberg I*, this court determined that the city's attempt to do so was unconstitutional and should be enjoined. The City contends that in *Nyberg I* this court held:

> 1. That if a state may not prescribe abortion conduct by a criminal statute, it may not prevent such conduct in its facilities by civil regulation;
>
> 2. That a state must show "compelling state interest" before it may regulate in the abortion area; and
>
> 3. That since a state may not interfere in the abortion decision, it may not bar the use of its facilities to prevent effectuation of that decision.

The City asserts that recent developments in the constitutional aspects of abortion law demonstrate that the constitutional bases which this court assumed to exist in *Nyberg I* no longer exist. It urges *Maher v. Roe*, 432 U.S. 464 (1977); *Poelker v. Doe*, 432 U.S. 519 (1977); *Harris v. McRae*, 448 U.S. 297 (1980); and *William v. Zbaraz*, 448

U. S. 358 (1980) represent a change in abortion law after *Roe v. Wade* and thus make the injunction no longer supportable. We must disagree. The decisions of the Supreme Court upon which the City relies do not provide a controlling change in the law.

In *Maher*, the Supreme Court held that even though the state was providing funding for childbirth, a state regulation denying funding for first trimester, nontherapeutic abortions was constitutional. In *Harris*, the Court upheld the constitutionality of the Hyde Amendment, which prohibited the use of federal funds to reimburse the cost of abortions except where the life of the mother would be in danger or where the rape or incest is reported promptly. In *Williams*, a state statute prohibiting the use of state funds for all abortions except for those "necessary for the preservation of the life of the woman seeking such treatment" was held constitutional.

In this trilogy of cases it was found that the constitutional freedom of a woman to decide whether to terminate her pregnancy recognized in *Roe v. Wade* did not prevent the state from making "a value judgment favoring childbirth over abortion, and . . . implement[ing] that judgment by the allocation of public funds." *Maher*, 432 U.S. at 474; *Harris*, 448 U.S. at 314. These cases do not reach the issue in *Nyberg I*. Under the resolution, the City of Virginia and the Hospital Commission attempt to do more than simply deny governmental funding for abortions. If the resolution is effective, then no woman could obtain an abortion in the city hospital unless her life was endangered. Thus, the City attempts to eliminate access to abortion services at the sole hospital in the City of Virginia.

The City places primary reliance on *Poelker v. Doe*, 432

U.S. 519 (1977). In that case, an *indigent* women challenged a policy directive prohibiting abortions in city hospitals except in cases of threat of grave injury or death to the woman. The hospital where the woman sought to obtain a nontherapeutic abortion was one of two city-owned hospitals in St. Louis. The obstetrical-gynecological department of that hospital was staffed with doctors who were graduates of St. Louis University, a Jesuit school of medicine opposed to abortion. No member of that medical staff was willing to perform an abortion. In enjoining the policy of the hospital, this court cast the issue in an equal protection mold, finding that the provision of publicly financed hospital services for childbirth but not for elective abortions constituted invidious discrimination. In support of its equal protection analysis, this court also emphasized the contrast between nonindigent women who can afford to obtain abortions in private hospitals and indigent women who cannot. *Doe v. Poelker,* 515 F.2d 541 (8th Cir. 1975), *rev'd,* 432 U.S. 519 (1977).

In reversing the decision, the Supreme Court found the constitutional question in *Poelker* identical with that presented by a state's refusal to provide Medicaid benefits for abortions while providing them for childbirth. 432 U.S. at 421. The Court stated that for the reasons set forth in *Maher,* St. Louis did not violate the Constitution by electing, as a policy choice, to provide publicly financed services for childbirth without providing corresponding services for nontherapeutic abortions. *Id.*

The City argues that the holdings in these cases make it clear that a state may decide to provide a certain health service—or not to provide such a service—and that providing of a particular service does not require the providing of another similar service. *Maher v. Roe,* 432 U.S. 464,

481 (Burger, C.J., concurring). The City further argues that this court found the limited purposes of the *Poelker* opinion was to demonstrate that *Maher's* approval of withholding medicaid subsidies for nontherapeutic abortions also applies to a city's denial of hospital facilities. *Reproductive Health Services v. Freeman*, 614 F.2d 585, 597 n. 22 (8th Cir.), *vacated*, 449 U.S. 809 (1980). Thus, arguably, a city has the right to express a preference for normal childbirth by denying staff physicians the use of the sole hospital in the community to provide abortion services to their paying patients.

We find the City's argument unpersuasive. The analysis in *Roe v. Wade* and *Doe v. Bolton* is still controlling. Any governmental regulation interfering with the effectuation of a woman's decision whether to bear a child can be justified only by a "compelling state interest" and any regulation must be narrowly tailored to meet that interest. *Roe v. Wade*, 410 U.S. at 155; *Planned Parenthood Ass'n v. Ashcroft*, 655 F.2d 848, 855 (8th Cir. 1981). Laws that limit access "to the means of effectuating" such decisions must be judged under strict scrutiny. *Carey v. Population Services International*, 431 U.S. 678, 688 (1977). Yet, regulations that refuse governmental funding for abortions are not "government-created obstacles" that restrict access to abortions, and no compelling state interest need be shown. *Maher*, 432 U.S. at 474; *Poelker*, 432 U.S. at 521; *Harris*, 448 U.S. at 315; and *Williams*, 448 U.S. at 369. Indigency is not a government created obstacle.

The facts in this case differ significantly from those in *Maher, Harris, Williams*, and *Poelker*. The City of Virginia and the Hospital Commission are not required to provide free abortions, hire doctors who will do abortions, or subsidize the abortion services. The injunction requires the

City simply to *allow* staff physicians at the community hospital to perform paid abortions at the hospital. There is no evidence that mere use of the Virginia Municipal Hospital by staff physicians to provide abortion services to their paying patients interferes with the normal hospital routine or causes the government to incur any expenditure of public funds. Obviously, in *Maher, Harris,* and *Williams* direct public expenditure was at issue.

In *Poelker,* the Supreme Court determined that a city hospital was not required *to spend* public funds to hire doctors who perform abortions or otherwise *provide* publicly financed hospital services for indigent women.[1]

There is a fundamental difference between providing direct funding to effect the abortion decision and allowing staff physicians to perform abortions at an existing publicly owned hospital. While it is true public money may have been used to build the hospital, that capital expenditure was to provide facilities for a large number of operations, of which first trimester abortions was but one. The decision that a city must allow staff physicians to perform abortions at the sole community hospital is far removed from those decisions which do not require direct public expenditure to facilitate abortions.

Equal Protection.

Finally, we observe that in *Maher, Poelker, Harris,* and *Williams* a state regulation was challenged and denied on equal protection grounds. In each of these cases, however, the Court expressed its view that the regulation may have been unconstitutional if it restricted access to the abortion

---

[1]We have recently observed that *Poelker v. Doe* did not hold that a state hospital may refuse to allow physicians to perform paid abortions in the hospital. *Planned Parenthood Ass'n v. Ashcroft,* 655 F.2d 848, 855 n.9 (8th Cir. 1981).

decision. In *Nyberg*, the City's resolution was not and is not now challenged on equal protection grounds. Under the resolution, both indigent and nonindigent women would be unable to obtain an abortion in Virginia. The challenge to the resolution rests on the fundamental proposition that the resolution constitutes an undue burden on access to abortions.

In *Nyberg I*, we found the resolution to be a substantial interference and burden on a woman's decision to have an abortion.[3] *Nyberg I*, 495 F.2d at 1345-46. Under the circumstances the City had the burden to justify the regulation by showing a compelling state interest. The City makes no attempt to show any state interest for the regulation. Thus, we continue to find that the regulation is not constitutional, however, more relevant to the issue here, we cannot find that recent constitutional decisions have fundamentally changed the law initially pronounced in *Roe* and *Doe*.

Conclusion.

A district court's ruling on a Rule 60(b)(5) motion will not be reversed on appeal unless it evidences an abuse of discretion. *United States v. Homestake Mining Co.*, 595 F.2d 421, 426 (8th Cir. 1979). We find no abuse of discretion in this case. We conclude the City has not shown that there has been a change in the law so that it is no longer

[3]Because of the prohibition on the use of the sole facility in the city for abortions, a woman is required to travel to another community. In so doing, the government is forcing the woman to take additional risks. She may not be allowed to be treated by her private physician at another hospital located in a different community; the likelihood exists that the doctor will probably not have staff privileges. The inability to rely on her own physician's services raises further complications. The woman's own physician would possess familiarity with the woman's background and needs; he would be in the best position to exercise the professional judgment necessary to determine whether abortion in a particular case would be advisable.

equitable that the injunction should have prospective application.[3] We therefore affirm the ruling of the district court.

---

[3]We find the decision of the New Jersey Supreme Court in *Doe v. Bridgeton Hospital Ass'n*, 71 N.J. 478, 366 A.2d 641 (1976), *cert. denied*, 433 U.S. 914 (1977) significant. In that case, three New Jersey hospitals adopted resolutions similar to the resolution enacted by the City of Virginia. The New Jersey Supreme Court ruled that the hosiptals were required to permit abortions to be performed at their facilities. The decision was appealed and the United States Supreme Court denied certiorari.

Portions of the New Jersey Supreme Court's discussion of the hospital's duty to the public are worthy of repetition and germane to the issue here:

> The hospital rule or regulation should be related to the hospital's purposes and operational needs. . . . Moral concepts cannot be the basis of a non-sectarian non-profit ellemosynary hospital's regulations where that hospital is holding out the use of its facilities to the general public. The board of trustees or directors, although vested with managerial discretion within the framework of the hospital's functions and purposes, may not promulgate unrelated policies. When it does so, its determinations are unsupportable and arbitrary.
>
> . . . .
>
> Medically there is no valid distinction which justifies permission to utilize hospital facilities and equipment for therapeutic, but not elective abortions.
>
> . . . .
>
> The defendants contend that the rules reflect the community's conscience and that to overrule that sentiment would cause the loss of substantial financial support. The contention rests on two assumptions—that a majority of the residents in the communities served by the three non-sectarian hospitals are opposed to permitting the facilities to be used for first trimester abortions and that these contrary-minded members of the citizenry will eliminate or reduce financial support for the hospitals. The record does not establish the first premise. Even though the propriety of elective abortions provokes highly emotional responses, it is extremely doubtful that the public will not assist the hospitals whose services are so vital for the public health and welfare of the community. Furthermore the defendants' contention conflicts with and ignores the underlying principle of a non-sectarian hospital, whose basic purpose is to make available hospital facilities for the care and treatment of the public.
>
> . . . .
>
> The federal constitutional right to an abortion during the first trimester is now well-settled. *Roe v. Wade, supra.* For the state to frustrate that right by its action would be violative of the constitutional guarantee.

Judgment affirmed.

HEANEY, Circuit Judge, dissenting.

I respectfully dissent. In my view, the majority opinion is inconsistent with the Supreme Court's decision in *Poelker v. Doe*, 432 U.S. 519 (1977), and is not required by *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973).

The majority would distinguish *Poelker v. Doe, supra*, 432 U.S. at 519, on the grounds that, here, the government (the City of Virginia) does not "incur any expenditure of public funds," and that in *Poelker*, the City of St. Louis did incur such expenditures. Slip op. at 7.

The argument fails for two important reasons:

(1) The record does not support the statement that the City of Virginia incurs no public expenditures when abortions are performed in the municipal hospital. It only supports the statement of Judge Stephenson in *Nyberg v. City of Virginia*, 495 F.2d 1342, 1345 (8th Cir. 1974) (*Nyberg I*), that the City would not be required to establish new or different facilities and staff in order to perform the operations. If the decision is to turn on the issue of whether costs are incurred, the matter should be remanded to the district court or additional findings.

(2) This Court based its decision in *Nyberg I* on the premise that under *Wade* and *Bolton*, a public hospital with suitable facilities cannot bar physicians from using the facilities to perform all nontherapeutic abortions. A panel of this Court followed *Nyberg I* in *Doe v. Poelker*, 515 F. 2d 541 (8th Cir. 1975). In *Poelker*, Judge Ross stated:

> Stripped of all rhetoric, the city here, through its policy and staffing procedure, is simply telling indigent women, like Doe, that if they choose to carry their

> pregnancies to term, the city will provide physicians and medical facilities for full maternity care; but if they choose to exercise their constitutionally protected right to determine that they wish to terminate the pregnancy, the city will not provide physicians and facilities for the abortion procedure, even though it is probably safer than going through a full pregnancy and childbirth. Roe v. Wade, 410 U.S. 113, 163, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). No rational or legally cognizable basis for this distinction is offered. And it is certainly true that this distinctive treatment represents as much interference in the abortion decision of an indigent woman by the city as the prohibition of all nontherapeutic abortions in city-operated hospitals condemned by this Court in Nyberg v. City of Virginia, 495 F.2d 1342 (8th Cir.), appeal dismissed, 419 U.S. 891, 95 S.Ct. 169, 42 L.Ed.2d 136 (1974).

Id. at 544-545 (footnote omitted).

In setting forth a remedy, the Court stated:

> We declare the city's policy prohibiting all nontherapeutic abortions in its publicly owned hospitals to be unconstitutional as an unwarranted infringement on pregnant women's right to privacy and as a denial of equal protection to indigent pregnant women. * * * We hold that both city owned hospital facilities must be made available for abortion services as they are for other medical procedures. Nyberg v. City of Virginia, *supra*, 495 F.2d at 1347.

Id. at 546 (citations omitted).

We remanded the matter to the district court to fashion prompt and appropriate declaratory relief. (Our order was subsequently stayed pending appeal to the Unitted States Supreme Court.) The Supreme Court reversed this Court, and remanded the matter to us for further proceedings consistent with its opinion. *Poelker v. Doe, supra,* 432 U.S. at 531. We promptly vacated our opinion and affirmed the dismissal of the action by the District Court for the Eastern District of Missouri. *Poelker v. Doe,* 558 F.2d 1346 (8th Cir. 1977). Thus, as matters stand, it appears that notwithstanding the dicta in *Planned Parenthood Association of Kansas City v. Ashcroft,* 655 F.2d 848, 855 n.9 (8th Cir. 1981), the City of St. Louis can prohibit all nontherapeutic abortions, either paid or nonpaid, from being performed in its publicly owned hospital while the City of Virginia cannot. This is an intolerable situation.

One final point. The majority states that the municipal hospital is the sole hospital in the City of Virginia. Slip op. at 5, 8 n.2. In doing so, it suggests that access to abortions may be curtailed or eliminated for those who live in Virginia and its environs. The record does not support this view. If reasonable access to abortions is to be a deciding factor in this and other similar cases, we should remand to the district court for further factfinding. If not, the fact that the municipal hospital is the only hospital in Virginia is irrelevant.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

Appendix C

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

September Term, 1981
No. 80-2132

GEORGE W. NYBERG, et al,

Appellees,

vs.

THE CITY OF VIRGINIA, et al,

Appellants.

JUDGMENT

Appeal from the United States District Court for the ———— District of Minnesota.

This cause was heard on a designated record from the United States District Court for the ———— District of Minnesota and on briefs of the respective parties and was argued by counsel.

After consideration, it is now ordered and adjudged that the order of the said District Court in this cause be, and the same is hereby, affirmed in accordance with the opinion of this Court.

January 11, 1982

Total allowable costs for appellees' brief (recoverable from Appellants): $226.45

Order entered in accordance with opinion.

/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, 8th Circuit.

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1981
No. 81-2132

GEORGE W. NYBERG, et al.,

Appellees,

vs.

THE CITY OF VIRGINIA, et al.,

Appellants.

Appeal from the United States District Court for the District of Minnesota.

The Court, having considered appellants' petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied. Judges Heaney, Henley and Arnold would grant the petition for rehearing en banc.

February 10, 1982

Appendix E

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-2132
Civil

GEORGE W. NYBERG, et al.,
Plaintiffs-Appellees,

vs.

THE CITY OF VIRGINIA, et al.,
Defendants-Appellants.

Appeal from the United States District Court
For the District of Minnesota
Hon. Donald D. Alsop

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

I. Notice is hereby given that Defendants-Appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment rendered by the United States Court of Appeals for the Eighth Circuit entered in this action on January 11, 1982, and from the denial of the petition for rehearing entered in this action on February 10, 1982. This appeal is taken pursuant to 28

U.S.C. §1254(2). Alternatively, the Defendants-Appellants respectfully request that the appeal be considered pursuant to 28 U.S.C. §1254(1) and 28 U.S.C. §2103.

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States pursuant to Rule 12 of the Supreme Court of the United States.

/s/ O. C. ADAMSON, II
2250 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402
(612) 338-0661
Attorney for Defendants-Appellants

AFFIDAVIT OF SERVICE BY MAIL

STATE OF MINNESOTA)
ss.
COUNTY OF HENNEPIN)

Gay L. Cleary, being first duly sworn, deposes and says: That on the 19th day of March, 1982, she served the attached Notice of Appeal to the Supreme Court of the United States upon Jeanne M. Forneris attorney representing the Plaintiffs-Appellees by depositing a true and correct copy thereof in the U. S. Mail in the City of Minneapolis, Hennepin County, Minnesota, with postage prepaid, in an envelope directed and addressed to said attorney at 2452 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402.

/s/ GAY L. CLEARY

Subscribed and sworn to before me this 19th day of March, 1982.

/s/ HOLLY J. DYSON
Notary Public
Hennepin County, Minn.

My Commission Expires April 8, 1983.

Motion to Dismiss

Office - Supreme Court, U.S.
FILED
MAY 10 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1782

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE CITY OF VIRGINIA and LEWIS A. McMILLAN, MRS. JOYCE FLEMING, RAYNOLD LAHTI, FRED TELLER, VIRGINIA MUNICIPAL HOSPITAL COMMISSION, and NORMAN KAYE, Virginia Municipal Hospital Administrator,

Appellants,

vs.

GEORGE W. NYBERG, NANCY R. NYBERG, FERN ARPI, WILLIAM A. ARPI, RACHEL ARPI, DR. CHARLES J. MOCK, DR. CHARLES A. TIETZ, MELODIE J. WILSON, JAMES E. WILLIAMS, on behalf of themselves and all others similarly situated,

Appellees.

MOTION TO DISMISS

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QUESTIONS PRESENTED

1. Is there jurisdiction of an appeal where this Court has dismissed an earlier appeal of the same case for want of jurisdiction and no state statute has been declared unconstitutional by the court of appeals?

2. Is a grant of certiorari appropriate where the court of appeal's decision that the trial court had not abused its discretion in refusing to vacate its injunction does not conflict with either other courts of appeals' decisions or established Supreme Court precedent?

3. Is a grant of certiorari appropriate where the question presented is whether the court of appeal's affirmance of the lower court's denial of appellant's motion to vacate an injunction pursuant to F.R.C.P. Rule 60(b) constituted an abuse of discretion?

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INTRODUCTION

The Appellees above named respectfully move to dismiss the Appeal herein and to deny review by way of certiorari. Rule 16.1(a), (b) and (d).

OPINIONS BELOW

The opinion of the court of appeals from which the Appeal is taken is reported at 667 F.2d 754 (8th Cir. 1982). The 1981 opinion of the District Court for the District of Minnesota is not reported.

JURISDICTION

Appellants seek review by way of a Notice of Appeal purportedly pursuant to 28 U.S.C. § 1254(2). In the alternative, Appellants seek a writ of certiorari pursuant to 28 U.S.C. § 1254(1), and 28 U.S.C. § 2103 which permits an appeal improvidently taken to be treated

as a Petition for Certiorari. No separate Petition for Certiorari has been filed.

As more fully set forth below, Appellees contend that this Court lacks jurisdiction of the appeal and that there is no reasonable ground for granting certiorari. Appellees respectfully request an award of reasonable damages and double costs pursuant to 28 U.S.C. § 2103.

STATEMENT OF THE CASE

This matter arises out of a February 5, 1973 resolution of the Virginia Municipal Hospital, Virginia, Minnesota, prohibiting the use of hospital facilities for the performance of any abortion not necessary to preserve the life of the mother. Appellees, physicians with staff privileges at the hospital, sought

and obtained an order of the United States District Court, District of Minnesota, permanently enjoining the Hospital Commission from enforcing the resolution. Nyberg v. City of Virginia, 361 F. Supp. 932 (D. Minn. 1973), aff'd 495 F. 2d 1342 (8th Cir. 1974), reh'g en banc denied 495 F.2d 1347 (8th Cir. 1974), appeal dismissed and cert. denied, 419 U.S. 891 (1974) (hereinafter "Nyberg I").

Under the terms of the injunction the Hospital Commission is required to make the hospital facilities available to duly licensed physicians who require the facilities for performing abortions for their patients. Neither the Hospital Commission nor the City of Virginia is required to provide subsidized abortions or hire physicians or other medi-

cal staff to perform abortions. The injunction made clear that no individuals are required to participate in providing abortion services in contravention of their religious or moral convictions. As framed by the district court the sole issue was . . . "whether a hospital owned and operated by the municipality of Virginia, Minnesota, can constitutionally prohibit licensed physicians on its staff from using the hospital facilities for the performance of abortions". 361 F. Supp. at 934.

In August of 1980, Appellants, pursuant to Rule 60(b)(5) of the Federal Rules of Civil Procedure, sought an order vacating the injunction on the grounds that it was "no longer equitable that the judgment should have prospective application." On November 10,

1980, the district court denied Appellant's motion on the grounds that to justify entitlement to such relief, the moving party must prove a change in circumstances (in law or fact) and demonstrate the continued enforcement of the injunction would constitute a severe hardship or grievous wrong, and that Appellants had not met that burden. Appellant appealed that decision to the United States Court of Appeals for the Eighth Circuit which affirmed the district court's findings in an opinion filed January 11, 1982, Nyberg v. City of Virginia, 667 F.2d 754 (8th Cir. 1982) (hereinafter "Nyberg II").

The court of appeals agreed with the district court's findings that the cases relied upon by the Appellants did not constitute a change in law; that the

Hospital Commission's resolution was a substantial interference with and a burden upon a woman's decision to have an abortion; that such a burden could not be justified in the absence of a showing of a compelling state interest; and that the Hospital Commission made no attempt to show any such state interest. The court concluded that the Hospital Commission had failed to show that there had been a change in the law so that it was no longer equitable that the injunction should have prospective application. By determining that the cases relied upon by the Hospital Commission had not worked a sufficient change in the controlling law, the court of appeals did not reach the question whether the Hospital Commission need also show that the continued enforcement of the

injunction would constitute a grievous wrong.

MOTION TO DISMISS

The Appellees hereby move to dismiss the Appeal on the ground that the Appeal is not within the jurisdiction of this Court.

Appellants claim a right of appeal pursuant to 28 U.S.C. § 1254(2). That statute provides for an appeal to this Court in cases where a court of appeals has held a state statute "invalid as repugnant to the Constitution...".

The asserted basis of jurisdiction is the same as that invoked by Appellants in 1974, when they sought review in this Court of the permanent injunction issued in Nyberg I. This Court dismissed the appeal for want of jurisdiction. City of Virginia v. Nyberg,

419 U.S. 891 (1974). No facts relevant to the jurisdictional issue have changed since that dismissal and it therefore stands as the law of the case, mandating dismissal of the instant appeal.

Appellants seek to evade the import of this Court's earlier finding of lack of jurisdiction by raising in their Jurisdictional Statement, for the first time in the litigation of Nyberg II, the issue of the constitutionality of Minnesota Statutes §§ 145.42 and 145.414. No court below considered the meaning or constitutionality of these statutes. The statutes have literally no bearing on the issues which were actually presented and decided below. Neither statute was referred to, much less held "repugnant to the Constitution", in either the district court or the court of appeals decisions.

The Hospital Commission's resolution at issue was enacted February 5, 1973. Nyberg v. City of Virginia, 361 F. Supp. 932, 934. The first statute which Appellants claim was held unconstitutional by the court of appeals is Minnesota Statutes § 145.414 which was enacted by the Minnesota Legislature on March 15, 1974 (Journal of House of Representatives, 68th Session, 1974, pp. 6229-6230), and did not become effective until March 22, 1974. Laws of Minnesota 1974, Chapter 177. Contrary to appellants' claim that the Hospital Commission resolution was adopted pursuant to this statute, the fact is that adoption of the resolution preceded the enactment of the statute by more than one year.

The second statutory provision which Appellant claims was held uncon-

stitutional by the court of appeals is Minnesota Statutes § 145.42 which provides as follows:

> "Subdivision 1. No physician, nurse, or other person who refuses to perform or assist in the performance of an abortion, and no hospital that refuses to permit the performance of an abortion upon its premises, shall be liable to any person for damages allegedly arising from the refusal.
>
> Subdivision 2. No physician, nurse, or other person who refuses to perform or assist in the performance of an abortion shall, because of that refusal, be dismissed, suspended, demoted, or otherwise prejudiced or damaged by a hospital with which he is affiliated or by which he is employed."

This statute, although in effect when the resolution was adopted, is clearly not at issue. No physician, nurse or other person has been compelled to perform or assist in the performance of an abortion, nor has there been any claim

to that effect. On the contrary, 1973 district court order granting the injunction specifically provides:

> "The court does not purport to require individuals to participate in the providing of abortion services in contravention of their religious or moral convictions. The relief granted goes only so far as to require that facilities at this public institution be provided for abortion services for those doctors and their women patients who have a right to them and request them." 361 F. Supp. at 939.

The absence of any such requirement in the injunction has been commented on by the court of appeals in both Nyberg I and Nyberg II and has served in part as the basis for the court's affirmance on both occasions. The record makes clear that the court of appeals was not asked to, and did not, rule on the constitutionality of any Minnesota state statute.

Appellants' attempt to draw totally irrelevant state statutes into the case at this late stage is necessitated by their implicit recognition that the Hospital Commission resolution itself is not a statute within the meaning of 28 U.S.C. § 1254(2). The right of appeal from a circuit court finding of unconstitutionality, although it has been found to encompass some local ordinances which are legislative in nature, has never been extended so far as to reach an operating resolution of a hospital board of commissioners. See e.g. Doran v. Salem Inn, Inc., 422 U.S. 922, 927, n.2 (1975); City of New Orleans v. Dukes, 427 U.S. 297, 301 (1976). The very strong policy counseling limitation of the § 1254(2) appeal as of right and the Court's practice strictly construing

statutes authorizing such appeals require rejection of such an unprecedented extension. See e.g. Fornaris v. Ridge Tool Co., 400 U.S. 41, 42 n.1 (1970).

REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

I. There is no basis for granting certiorari because the court of appeals decision that the lower court had not abused its discretion in refusing to vacate its injunction does not conflict with other courts of appeals' decisions, nor with established Supreme Court precedent.

Considerations governing review of certiorari are delineated in Rule 17 of the rules of this Court. Petitioners have advanced none of the "special and important reasons" for granting certiorari contemplated by that rule.

A. There is no conflict between the decision in the present case and any decision of another court of appeals.

Petitioners do not claim that certiorari should be granted because of a conflict between the ruling in the present case and the decision of another court of appeals. Rule 17.1(a). Respondents are unaware of any other circuit court decision on the same issue.

B. The decision of the court of appeals that the lower court has not abused its discretion in denying the petitioner's motion to vacate the injunction is consistent with this Court's rulings.

The Eighth Circuit's holding followed established Supreme Court precedent. In Roe v. Wade, 410 U.S. 113 (1973), this Court established that the "right of privacy ... founded in the Fourteenth Amendment's concept of personal liberty

... is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 153. During the first trimester, "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician". Id. at 164, (emphasis added). Because the constitutional right of privacy guarantees independence in making certain fundamental decisions about whether or not to bear a child, government regulation directly interfering with these decisions can be justified only by a showing of "compelling state interest" and must be narrowly tailored to meet that interest. Id. at 155. This Court has consistently employed this standard in reviewing regulations directly burdening the right to choose

abortion. Doe v. Bolton, 410 U.S. 179 (1973); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976); Bellotti v. Baird, 428 U.S. 132 (1976); Colautti v. Franklin, 439 U.S. 379 (1979); Bellotti v. Baird, 443 U.S. 622 (1979).

The lower courts here were faced with a challenge to a requirement which sought to restrict access to abortion services for women living in the City of Virginia. Accordingly, the courts' review followed the due process analysis set forth in Roe v. Wade and its progeny. As the Eighth Circuit noted:

> "Laws that limit access 'to the means of effectuating' such decisions must be judged under strict scrutiny. [citation omitted]" (A - 14).

C. The cases upon which petitioners rely do not change applicable principles of constitutional law.

The only basis upon which the Hospital Commission sought to vacate the injunction was its claim that recent developments in the constitutional aspects of abortion law represented a change in law from this Court's holding in Roe v. Wade. Petitioners continue to urge that Maher v. Roe 432 U.S. 464 (1977); Poelker v. Doe 432 U.S. 519 (1977); Harris v. McRae, 448 U.S. 297 (1980); and Williams v. Zbaraz, 448 U.S. 358 (1980), undermine the constitutional basis for the injunction. As the court correctly observed, these cases are inapposite. All of these cases involve a delineation of a state's affirmative obligations, if any, when state subsidies are at issue. Both the level of scrutiny and the facts of the funding cases distinguish them from the instant case.

Maher v. Roe involved a suit brought by two indigent pregnant women seeking Medicaid funds for elective abortions. This Court held that it was not a denial of equal protection for the State of Connecticut to provide Medicaid payments for the cost of childbirth, but not for non-therapeutic abortions. Finding that women had no fundamental right to state funds for elective abortions, this Court subjected the restriction to only minimal review. Id. However, in Maher, this Court made crystal clear that minimal review is not applicable where the government is using the force of law to restrict access to abortions:

> "Our conclusion signals no retreat from Roe or the cases applying it. There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity

> consummate with legislative policy. [footnote omitted] Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader." 432 U.S. at 475-76.

In Harris v. McRae, and its companion case, Williams v. Zbaraz, this Court addressed the issue of an indigent woman's entitlement to government funding for medically necessary abortions, and determined that the Hyde Amendment to Title XIX, withdrawing federal funds for most abortions, was not unconstitutional in that it placed no government created obstacle in the path of a woman who chose to terminate her pregnancy. In both Maher and McRae, this Court affirmed that the Constitution "protects the woman from unduly burdensome interference with her freedom to decide

whether to terminate her pregnancy." Maher v. Roe, 432 U.S. at 473-74; Harris v. McRae, 448 U.S. at 314.

In both cases, a strict scrutiny test was not applied, but rather, funding cases were distinguished from other abortion cases, and this Court held that there is no right to government abortion funding. Therefore, no fundamental right is burdened by the withdrawal of such funding. Maher v. Roe, 432 U.S. at 474, Harris v. McRae, 448 U.S. at 314. As this Court explained in McRae:

> "...although the government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category. The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the products not of governmental restrictions on access to abortions, but rather are her indigency." 448 U.S. at 316.

Poelker v. Doe, upon which Petitioners place primary emphasis, is also a funding case. Poelker involved the question of whether a public hospital had an affirmative obligation to provide and subsidize abortion services. Suit was brought by an indigent woman who represented a class of women seeking elective abortions in one of two city-owned hospitals in St. Louis, Missouri.

The lower court had determined that the hospital, one of many in the St. Louis metropolitan area, lacked medical personnel willing to perform abortions, because the obstetrical-gynecological staff were drawn from the St. Louis University School of Medicine, a Jesuit-operated institution philosophically opposed to abortion. The court ordered that the city had an affirmative obliga-

tion to provide funds, recruit and hire staff, and actually perform abortion services. Doe v. Poelker, 515 F.2d 541 (8th Cir. 1975) This Court, in a three page per curiam opinion relying on Maher, reversed the decision and rejected the holding that a state had an affirmative obligation to provide or subsidize abortion services.

As the Eighth Circuit noted, the facts in this case are radically different from those in Poelker. The City of Virginia and the Hospital Commission are not required to provide free abortions, to hire doctors who will perform them, or to subsidize the provision of abortion services. Respondents are physicians with staff privileges at the sole hospital in the area who wish to use hospital facilities to provide abortion

services to their fee paying patients who seek them.

In Maher, this Court carefully pointed out that in that case, the state "... has imposed no restriction on access to abortions ..." 432 U.S. at 474. In this case, the Petitioners do not dispute the fact that implementation of the Hospital Commission resolution would not simply restrict access, but eliminate it in total. This Court has made it clear that a state need not remove obstacles not of the state's own creation, particularly the obstacle of indigency, but it has never given any state license to create an obstacle such as that contemplated by the Virginia Hospital Commission.

Petitioners have failed to allege in any stage of the proceedings below,

any state interest, let alone a "compelling" interest, to justify implementation of the resolution. Nyberg v. City of Virginia, 667 F.2d 754, at 758. In Carey v. Population Services International, 431 U.S. 678 (1977), this Court struck down a New York statute which, among other things, limited the sale of non-prescription contraceptives to pharmacies and held that "access to contraceptives" is "...essential to the exercise of the constitutionally protected right of decision in matters of childbearing." 431 U.S. at 688. In articulating the applicable standard of review, this Court held:

> "The same test must be applied to state regulations that burden an individual's right to decide to prevent conception or terminate pregnancy by substantially limiting access to the means of effectuating that decision entirely. Both types

of regulations "may be justified only by a 'compelling state interest'... and must be narrowly drawn to express only the legitimate state interests at stake." Id., quoting Roe v. Wade, 410 U.S. at 155.

Certainly the virtual bar to access in the instant case is more severe than the law eliminating the sale of contraceptives to pharmacies at issue in Carey. Yet Petitioners have not asserted, in the original action, their motion to vacate the injunction, the appeals before the Eighth Circuit, nor in their Petition to this Court, the nature of the compelling state interest at stake, nor how the Hospital Commission resolution is narrowly drawn to achieve that interest.

II. A grant of certiorari is not appropriate where the question presented is whether the court of appeals' affirmance of the lower court's denial of petitioners' motion to vacate its injunction constituted an abuse of discretion.

Because of the factual and procedural context in which Nyberg II arose, this case does not present a situation appropriate for the granting of certiorari. The sole issue presented to the district court in Nyberg II was whether, pursuant to the requirements of F.R.C.P. 60(b), Petitioners had shown that there has been such a change in controlling principles of law since 1973, so as to make it no longer equitable that the judgment should have prospective application. In support of its motion to vacate the injunction, Petitioners alleged no change in factual circumstances, and offered no additional proof, relying solely on the public funding decisions of this court.

The only issue before the court of appeals in Nyberg II was whether the

district court had abused its discretion in refusing to vacate the 1973 injunction. Affirming the lower court's finding that the intervening Maher, McRae, Zbaraz and Poelker cases has not sufficiently wrought a change in controlling principles of law, the Eighth Circuit did not even reach the question of whether the Petitioners had shown evidence of grievous wrong. (A-11).

Motions to vacate an injunction brought pursuant to F.R.C.P. 60(b) are addressed to the sound legal discretion of the district court, and, accordingly, appellate review is limited to determining whether the district court abused that discretion. Underlying this rule of limited appellate review is the basic doctrine of judicial finality.

The injunction issued in 1973 was supported by specific findings of the trial court that the regulation constituted an undue burden on the abortion right without being justified by a compelling state interest. Seven years later, Petitioners moved the court to vacate its injunction. They failed to show that this Court's decisions in Maher, Poelker, McRae and Zbaraz had caused a change in controlling law such that the constitutional basis for the injunction no longer existed. Absent such a showing, the district court and appeals court correctly left the 1973 decision undisturbed.

CONCLUSION

For the foregoing reasons, the Appeal should be dismissed and the Petition for a Writ of Certiorari should be denied.

Respectfully submitted.

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Amicus Brief

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No. 81-1782

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1981

CITY OF VIRGINIA

vs.

GEORGE W. NYBERG, ET AL.
APPELLANT

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE BY THE LEGAL DEFENSE FUND FOR UNBORN CHILDREN IN SUPPORT OF THE APPELANTS

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No. 81-1782

In The
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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE BY THE LEGAL DEFENSE FUND FOR UNBORN CHILDREN IN SUPPORT OF THE CITY OF VIRGINIA, THE APPELLANT

The court is moved for leave to file the attached brief amicus curiae.

The interest of the amicus cruiae is described in the attached brief.

The amicus brief presents facts and authorities to the Court not presented by the parties. These facts and authorities are dispositive of the case.

Alan Ernest
Counsel for Amicus

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AMICUS CURIAE BRIEF BY THE LEGAL DEFENSE FUND FOR UNBORN CHILDREN

Interest Of Amicus Curiae

The Legal Defense Fund For Unborn Children is an organization whose purpose is to protect the constitutional rights of children unborn and born alive.

This amicus brief is submitted in support of the appellants.

Summary of Argument

The amicus curiae submits evidence not submitted by the parties, to show that Roe v. Wade is a mistake of law. The Roe v Wade killings violate the Fifth and Fourteenth Amendments of the U.S. Constitution. Any Justice who takes part in these killings can be criminally prosecuted. One of the giant homicidal frauds in the history of the world has been perpetrated on the American republic. The dagger of the assassin has been concealed beneath the robe of the jurist. This court has already overruled Roe v Wade, and must now do it expressly.

Argument

I. ROE v WADE IS BASED ON FALSE EVIDENCE, AND THE VICTIMS ARE BEING EXTERMINATED IN VIOLATION OF THE U.S. CONSTITUTION.

The evidence, summarized below, proves that the Court's conclusion in Roe v Wade, 410 U.S. 113, 158, "that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn," is based on a fatal reversal of the burdens of proof and persuasion, and indispensable parts of the Court's evidence is fabricated and false. The evidence establishes, beyond the legal power of any federal judge to deny, that the unborn are persons whose lives are protected by the Fourteenth Amendment, as follows:

A.

Even the Court admitted in Roe v Wade, 410 U.S. at 156-157, that if the unborn were "a 'person' within the language and meaning of the Fourteenth Amendment," then the case for a constitutional right to kill the unborn, as claimed in Roe v Wade, "of course collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment."

B.

The terms of the Fourteenth Amendment ("nor shall any state deprive any person of life ... without due process of law")(emphasis added) are "universal in their application." Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). The words "any person" admit of no exceptions whatever. Thus, on their face, the words "any person" include the unborn, as everyone else.

C.

The holdings of Chief Justice Marshall show that the Supreme Court had no lawful power to construe an exception to express, universal terms (such as "any person") unless the Court can show that "the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application."[1/] And the Court must further prove that "had this particular case been suggested " to the framers, "the language would have been so varied as to exclude it."[2/]

1./ Sturges v Crowninshield, 4 Wheat. 122,202-3.
2./ Dartmouth College v Woodward, 4 Wheat.518,644-5.

Chief Justice Marshall founded the universality of the Supreme Court's jurisdiction on these very rules. 3/

The Court thus bore a very extraordinary evidentiary burden before it could create an exception to the universal terms "any person" so that victims could be killed in violation of positive criminal statutes.

3./ Cohen v Virginia, 6 Wheat. 264, 378-380.

4./ The truth of this extraordinary evidentiary burden can be demonstrated by applying it to various cases. Before the Court could create an exception to the universal terms "any person" so that Jews, or Catholics, or the insane, could be killed like the unborn, the Court would have to demonstrate that "the absurdity and injustice of applying the provision [the terms- "any person"] to the case [the case of - Jews, Catholics, or the insane],would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application." Sturges v. Crowninshield, supra. And the Court must prove that if the case of the Jew, Catholic, or the insane had been suggested to the framers of the Fourteenth Amendment, then "the language would have been so varied, as to exclude it." Dartmouth College v. Woodward, supra. The framers would have changed the words of the Amendment to read that "No state shall deprive any person, except Jews, Catholics or the insane, of life ... without due process of law."

These same extraordinary evidentiary burdens must universally apply to all groups whose personhood may be challenged, including the unborn. Thus the Court bore the heaviest evidentiary burden possible in constitutional interpretation in order to create an exception to the universal terms "any person" so the unborn could be killed for any reason, or no reason, in violation of positive criminal statutes.

D.

The Supreme Court presented false evidence in Roe v Wade to support its conclusion that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." Roe v Wade, 410 U.S. at 158. And, but for the false evidence, there is not even a credible foundation, much less a compelling one, for denying the protection of the express, universal terms "any person" to the life of the unborn.[5/]

5./Summary of False Evidence:

In introduction, at the time the Fourteenth Amendment was adopted in 1868, most states had already enacted positive statutes that made abortion a crime unless it were necessary to save the life of the mother. Within a few years, these criminal abortion statutes were virtually universal.

Consequently, any theory of a constitutional right to abortion on demand faced an impossible contradiction: How is it possible that the people who adopted the Fourteenth Amendment had enacted positive criminal statutes to protect unborn life, but, at the same time, without a single word of explanation, intended to imply an exception to the express, universal terms that not "any person" can be deprived of life without due process of law, and to create a constitutional right to kill the unborn?

To resolve that fatal contradiction, the Court asserted the hypothesis that when the criminal abortion statutes were first enacted, the laws were not intended to protect unborn life, but rather were

E.

Not only are indispensable parts of the Supreme Court's evidence false, but the Court also fatally reversed the burdens

only intended to protect the mother. This hypothesis was falsely fabricated and used as follows:

A.

The Supreme Court first asserted, "When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman." Roe v Wade, 410 U.S. at 148. This was asserted as fact.

The only authority cited by the Supreme Court to prove this assertion of fact was a 20th century medical history book, Haagensen and Lloyd, A Hundred Years of Medicine 19 (1943), cited in Roe v Wade, supra, at 148n.43. But this book merely described the hazards of major surgery in general prior to Liter's discovery of antiseptics. The reference did not even mention the abortion operation.

However, the 19th century obstetric authorities throughout the Western world prove the Court's assertion of fact to be false. These 19th century obstetric authorities, based upon their own experience in performing abortions, and from hundreds of cases reported from around the world, declared in their obstetric textbooks that the abortion operation, the operation of artificially evacuating the fetus from the womb, was "perfectly safe" to the mother, 2 T. Denman, M.D., An Introduction to the Practice of Midwifery 96 (1802)(English physician); or "experience has proved that the dangers of the operation are reduced to a small matter," A.L.M. Velpeau, M.D., A Complete Treatise on Midwifery 530 (4th Am. ed. 1852)(French physician); or "to the mother there is very little danger." H.L. Hodge, M.D., The Principles and Practice of Obstetrics 293 (1864)(American physician). In short, the 19th century obstetric authorities prove the Supreme Court's assertion of fact to be false.

of proof and persuasion, as set out in the holdings of Chief Justice John Marshall. See pages 3-4, supra. Instead of the burden of

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The Supreme Court never revealed the "hazardous" abortion "procedure" to which it was referring. Actually, the 19th century physicians used the ancient method: "the membranes of the ovum are punctured," which permitted "the discharge of the waters," which induced the "action of the uterus" to "come on," which resulted in the expulsion of the fetus from the womb. 2 Denman, supra, 99. One 19th century physician traced this operation back almost 2000 years. F. Ramsbotham, M.D., The Principles and Practice of Obstetric Medicine 724 (4th ed. 1856).

Consequently, the 19th century physicians were using an ancient abortion operation which they described as not hazardous to the woman. The Supreme Court did not examine even one 19th century obstetric textbook. And the medical textbooks prove its assertion of fact, "When most criminal laws were first enacted, the procedure was a hazardous one for the woman," to be false.

B.

The Supreme Court next asserted, "Abortion mortality was high." Roe v Wade, 410 U.S. at 149. This is asserted as fact.

The Supreme Court asserted "Abortion mortality was high," without any authority to support it. It was a naked assertion. The 19th century obstetric authorities also prove this assertion of fact to be false. The medical authorities, supra, expressly asserted that the abortion operation was not deemed to be hazardous to the mother.

Consequently, the Court's assertion that "Abortion mortality was high" is false.

C.

Upon the two false assertions of fact, the Supreme Court infers that "a State's real concern in enacting a criminal abortion law was to protect the

proving that including the unborn within the terms "any person" "would be so monstrous, that all mankind would, without hesitation, unite in rejecting the appli-

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pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy." Roe v Wade, 410 U.S. at 149.

D.

From the inference that the criminal abortion laws were not intended to protect the unborn, the Court further inferred that, likewise, the framers of the Fourteenth Amendment did not intend it to protect the lives of the unborn, "that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." Roe v Wade, 410 U.S. at 158. This conclusion rests entirely on inference.

And the pyramid of inference is shown to rest on assertions of fact that are false.

Moreover, as independent corroboration of the purpose of the criminal abortion statutes to protect the unborn, 19th century authorities in criminal law, e.g., 2 Archbold, Archbold's Criminal Procedure, Pleading and Evidence 295 (6th ed. 1853); medical jurisprudence, e.g., F. Wharton and M. Stille, M.D., A Treatise on Medical Jurisprudence 339, 927 (2d ed. 1860); medicine, e.g., 12 Transactions of the American Medical Association 27-28 (1860); and well as state supreme courts, e.g.. State v Moore, 25 Iowa 128, 131, 135-36(1868), leave no doubt that these abortion laws were intended to protect the lives of the unborn. Consequently, there is no other body of evidence to come to the Supreme Court's rescue.

CONCLUSION

The Supreme Court bore the burden of demonstrating, beyond a doubt based on reason, that the absurdity and injustice of including the unborn within the

cation," the Supreme Court reversed the burden. The Court placed the burden on the unborn to prove with "assurance" (that is, to make certain and put beyond doubt) that they were persons within the terms "any person," or the unborn would be excluded from the terms "any person." Rather the burden was on the Supreme Court to prove

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terms "any person" would be "so monstrous, that all mankind would, without hesitation, unite in rejecting the application," Sturges v Crowninshield, supra. And the Court had to prove to a demonstration that if the case of the unborn had been presented to the framers and adopters of the Fourteenth Amendment, "the language would have been so varied as to exclude it." Dartmouth College v Woodward, supra.

But, the Supreme Court did not cite even one single 19th century authority that expressly agreed with its conclusion that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn," much less one that asserted that there was a constitutional right to kill the unborn, as set out in Roe v Wade. And the court's assertion that the 19th century abortion laws were not intended to protect the lives of the unborn is shown to rest on false evidence.

The legal history demonstrates that the people who framed and adopted the Fourteenth Amendment not only intended it to protect the lives of the unborn, but these people had already enacted criminal abortion laws to do so in fact. This case for the unborn is absolutely conclusive. The terms "any person" must include the unborn.

with "assurance" that the unborn were not included within the terms "any person" or they would be included.[6/] And the evidence for the unborn is far stronger than that for many groups which the Court has judicially recognized to be included within the uni-

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6./ The Court illegally switched the burdens of proof and persuasion in the following manner. The Court first decreed a constitutional right to kill the unborn. Roe v Wade, 410 U.S. at 153. Then, subsequently, the Court examined the question of the personhood of the unborn under the Fourteenth Amendment. Thus, in accordance with its compelling state interest test, once the constitutional right to kill the unborn was established, the burden was on the unborn to demonstrate the compelling justification of the criminal abortion statutes; that is, the burden was on the unborn to affirmatively prove that they were persons within the meaning of the terms "any person" in the Fourteenth Amendment- or be excluded.

Moreover, the objections which the Court raised to defeat the personhood of the unborn in Roe v Wade, 410 U.S. at 156-158 were either false, or irrelevant. This evidence will be submitted to the Court on request. The Court exactly perceived its function as that of a criminal defense lawyer who only has to raise doubts about the prosecution case to win. But the Court cannot exclude anyone from the protection of the words "any person" by merely working up quibbles or "inconsistencies." Roe v Wade, supra, 158 n.54.

Could the Court first decree a constitutional right to kill Jews? And then place the burden on the Jews to affirmatively prove that they are included within the terms "any person"? And then, by quibbling with the Jews' evidence, decide the Jews were not included within the terms "any person" so they could be hauled off to the graveyard?

versal terms "any person." 7/

The Supreme Court has exactly defied the express words "any person" in the Constitution, and their spirit,8/ as well as the plain intention of the framers,9/ and condemned to death those victims whom the Constitution endeavors to preserve.

7./ The Court was so certain that "corporations" were included within the terms "any person" that it forbade any oral argument to the contrary. Santa Clara v. So. Pac. RR, 118 U.S. 394,396. And the Court held that "strangers and aliens" were included within the terms "any person" by merely observing: "These terms are universal in their application." Yick Wo v Hopkins, supra, at 369.

8./ The uncontradicted scientific evidence in Roe v Wade showed that the unborn child "is alive," that the fetal heartbeat begins "pulsations at 24 days," and "brain waves have been noted at 43 days."

The Court itself has recognized that, while the Declaration of Independence is not law in itself, yet it is "the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence." Gulf, Colo. & S.Fe v Ellis, 165 U.S. 150, 159-160.

The undisputed scientific evidence proves that the unborn child has been "created" and thus endowed with an "unalienable" right to "life," and within the spirit of the terms "any person." The Court would amend the Declaration to read that "all men are created equal-except those created to die for the convenience of others."

9./ The evidence, supra page 5 n.5, shows that the framers of the 14th Amendment not only intended the lives of the unborn to be protected by the terms "any person," but they had already enacted criminal abortion statutes to do so in fact.

II. THE U.S. SUPREME COURT HAS WILLFULLY USED UNCONSTITUTIONAL PROCEDURES TO EFFECT AND MAINTAIN THE ROE v WADE KILLINGS.

The Supreme Court willfully used unconstitutional procedures to effect the Roe v. Wade killings.

And the Supreme Court has subsequently decided many abortion cases on the merits, but willfully used unconstitutional procedures to maintain the killings, as follows:

1. The Supreme Court willfully refuses to

Counsel did not especially represent the unborn in the District Courts in Roe v Wade and Doe v Bolton. And the Supreme Court denied Bolton's request to allow counsel to represent the unborn in the Supreme Court. Thus, counsel did not represent the unborn at any stage of the original proceedings.

The question of the personhood of the unborn under the Fourteenth Amendment came up for the first time in the original proceedings after the cases reached the Supreme Court. Since no group had ever been excluded from the protection of the Fourteenth Amendment so they could be killed, the original parties had no notice of the kind of evidence, or the burdens of proof and persuasion the Court would deem determinative. The first time the parties understood this was when Roe v Wade issued, and the victims were condemned to death. But the Court had taken judicial notice of numerous facts and factors which the original parties had not seen, much less cross-examined in a judicial proceedings. An original party asked permission to cross-examine the Court's evidence. But the Supreme Court would not allow its evidence to be cross-examined.

allow retained counsel(no cost to taxpayers) to represent the victims being killed; [2]

. 2. The Supreme Court willfully refuses to allow the evidence in Roe v Wade, which it used to condemn the victims to death, to be cross-examined; [3]

3. The Supreme Court willfully refuses to allow evidence to be presented on behalf of the victims being killed to establish their right to life under the U.S. Constitution.[4]

The U.S. Supreme Court's own rulings on due process of law show these procedures to

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2./ Some of these cases are: Colautti v. Franklin, 58 L Ed 2d 596, motion to allow counsel to represent unborn denied 57 L Ed 2d 1131(1978); Anders v. Floyd, 59 L Ed 2d 442, motion to allow counsel to represent the unborn denied 235(1978); Bellotti v. Baird, 61 L Ed 2d 797, motion to allow counsel to represent the unborn denied 59 L ed 2d 29(1979); Ashcroft v Freiman, 59 L Ed 2d 630, motion to allow counsel to represent unborn denied 59 L Ed 2d 630 (1979); United States v Zbaraz, 65 L Ed 2d 831, motion to allow counsel to represent the unborn denied 62 L Ed 2d 665-6(1980); Harris v. McRae, 65 L Ed 2d 784, motion to allow counsel to represent unborn denied 63 L Ed 2d 784, motion to allow counsel to represent unborn denied 63 L Ed 2d 775 (1980); H.L. v Matheson, 67 L Ed 2d 388, motion to allow counsel to represent unborn denied 64 L Ed 2d 234(1980).

3./ Supra Note 2.

4./ Supra Note 2.

to be unconstitutional[5] and criminal.[6]

5./ The U.S. Supreme Court has held that even in civil, non-judicial proceedings, where crucial deprivations are threatened, such as loss of welfare, due process guarantees (1) Notice; (2) the right to be heard and to present evidence; (3) the right to confront and cross-examine adverse evidence; (4) the right of representation by retained counsel; (5) the right of an independent decisionmaker; (6) the right to have a written statement by the decisionmaker of the evidence relied upon and the reasons for the determination. Goldberg v Kelly, 397 U.S. 254, 268-271(1970). In Re Gault, 387 U.S. 1(1967); Morrissey v. Brewer, 408 U.S. 471 (1972); Gagnon v Scarpelli, 411 U.S. 778 (1973); Viteck v Jones, 63 L Ed 2d 552 (1980). Since the unborn are being killed, there can be no question whatever that these elements of due process of law are guaranteed.

6./ The criminality of such process is evident. Could a judge use such procedures to legalize the killings of the insane, or Jews? These are effectively the same procedures cited by the Nuremberg Court in convicting the Nazi judges of criminal extermination. United States v Altstoetter(The Justice Case), 3 Trials of War Criminal Before the Nuernberg Military Tribunals 1046(1951).

Can it now be argued that a judge, who could not condemn even one Jew to death without counsel in a criminal case, could condemn all Jews in the United States to death without counsel by calling it a civil case and decreeing that the lives of Jews were not protected by the Constitution? A person cannot be deprived of life or liberty without due process of law, regardless of the description of the proceeding. The Constitution thus guarantees that any proceeding to determine if one is a person within the meaning of the Constitution must satisfy due process of law.

And any judge who willfully deprives any victims of constitutional rights under a guise of law can be criminally prosecuted. Imbler v. Pachtman, 424 U.S. 409 (1976).

III. THE U.S. SUPREME COURT HAS CONFESSED IN COURT TO GUILT OF CRIMINAL EXTERMINATION, INCLUDING MASS MURDER, AND THIS IS THE LEGAL EQUIVALENT OF THE EXPRESS OVERRULING OF ROE v WADE, 410 U.S. 113 (1973).

For the 65th time, the U.S. Supreme Court is accused in its own court with criminally exterminating millions of lives in violation of the U.S. Constitution, and 18 USC 242.[1/]

For the 41st time, the U.S. Supreme Court is accused in its own court with mass murder in violation of state and federal statutes.[2/]

For about the 45th time, the U.S. Supreme Court is accused in its own court with willfully using unconstitutional, criminal procedures to maintain the Roe v Wade killings.[3/]

But, year after year, the U.S. Supreme Court has not denied the charges, much less

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1./ Charges based on evidence, supra page 2.

2./ Charges based on evidence presented in MOTION TO ALLOW COUNSEL TO REPRESENT CHILDREN UNBORN AND BORN ALIVE, incorporated herein by reference.

3./ Charges based on evidence, supra page 12. The evidence makes it plain why the U.S. Supreme Court is willfully using unconstitutional procedures to maintain the killings. The evidence proves, beyond the power of any federal judge to deny, that the charges are true.

attempted to prove the charges to be false. This silence year after year in the face of accusation, while the victims are being killed, amounts to a confession in court that the charges are true.[4/] This tacit admission that Roe v Wade is a mistake of law is the legal equivalent of the express overruling of Roe v Wade. Any judge or party who chooses to close his eyes on these

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4./Under "the tacit confession rule," McCormick on Evidence §§ 161, 270, failure to deny a charge is equivalent to a confession that the charge is true. 4 Wigmore, Evidence, §§ 1071-1072(Chadborn rev 1972). "Underlying the rule is the assumption that human nature prompts an innocent man to deny false accusations and consequently a failure to deny a particular accusation tends to prove belief in the truth of the accusation." McCormick, supra, §161. And the Supreme Court itself has consistently recognized this rule. "(T)he Court has consistently recognized that ... silence in the face of accusation is a relevant fact. .... Silence is often evidence of the most persuasive character." Baxter v Palmigiano, 425 U.S. 308, 319(1976). And the rule is ancient. As Socrates cross-examined at his trial over 2000 years ago, "you are silent and have nothing to say. But is this not rather disgraceful, and a very considerable proof of what I was saying." And again, "I may assume that your silence gives assent." Apology in Plato 41, 45 (Jowett trans. Classics Club 1942).

And concerning the Court's continuing silence year after year, "Silence gains more probative weight where it persists in the face of accusation, since it is assumed in such circumstances that the accused would be more likely than not to dispute an untrue accusation." United States v. Hale, 422 U.S. at 176.

unparalleled facts, and argues that the killings can continue without question, can be prosecuted for complicity in criminal extermination just as if he had encouraged the killings after Roe v Wade was expressly overruled.[5/]

5./ The Supreme Court asserted to legalize killings which violated positive criminal statutes, in including murder statutes. If Roe v Wade is a mistake of law, then all the killings since 1973 can be criminally prosecuted. The ex post facto provisions of the U.S. Constitution do not apply to judicial decision which are a mistake of law. Ross v Oregon, 227 U.S. 150(1913). The general rule is that mistake of law is no excuse for breaking the law. Perkins, Criminal Law 920(2d ed. 1969). The narrow exception of reasonable reliance on a court opinion thereafter determined to be a mistake of law does not apply to homicide cases. Model Penal Code, Tentative Draft No. 4, Comments § 2.04, page 138. In any event, "after a warning," such as given herein, a defendant can not claim his reliance was reasonable. Id., at 138. And one can be criminally implicated in homicide by mere words of encouragement while the victims are being killed. Lafave and Scott, Criminal Law §§ 61,64(1972).

To illustrate the true status of Roe v Wade, suppose that a lawyer had accused "the supreme judge" of Nazi Germany of mass murder 40 times in court, but each time "the supreme judge" listened in silence and did not deny the charge and prove it false, and just continued the killings. Would such judicial conduct have warranted people in arguing that the killings could continue without question? The Nuremberg Court answered that question. Such argument amounts to criminal complicity in extermination.

Roe v Wade has been overruled. In the face of these unparalleled facts, one must literally gamble life and liberty to support it. Many states still punish mass murder with the death penalty.

CONCLUSION

The Supreme Court has perpetrated one of the giant homicidal crimes in history on the United States. And the prostitution of a judicial system for the accomplishment of criminal extermination involves an element of evil which is not found in frank atrocities which do not sully the judicial robes. The dagger of the assassin has been concealed beneath the robe of the jurist.

By its conduct, the U.S. Supreme Court has overruled Roe v Wade, 410 U.S. 113. Mere argument that the killings can continue can be criminally prosecuted. To save innocent lives from extermination, and uninformed persons from prosecution, the Supreme Court must expressly overrule Roe v Wade.

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Alan Ernest
Counsel for Amicus

Motion

Supreme Court, U.S.
FILED
APR 22 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1782

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1981

CITY OF VIRGINIA

vs.

GEORGE W. NYBERG, ET AL.

APPELLANT

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION TO ALLOW COUNSEL TO REPRESENT CHILDREN UNBORN AND BORN ALIVE

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MOTION TO ALLOW COUNSEL TO REPRESENT CHILDREN UNBORN AND BORN ALIVE

The Court is moved to allow Alan Ernest to represent the victims being killed by Roe v Wade, 410 U.S. 113, as counsel or guardian ad litem.

Interest of Counsel

Alan Ernest is a lawyer in the District of Columbia and a member of the bar of this Court. His interest is to defend the Constitutional right to life of children unborn and born alive who are being killed pursuant to Roe v Wade. The parties have not done this. Counsel will present facts and authorities not presented by the parties.

This is effectively a motion to allow retained counsel to represent the victims being killed, since there will be no expense to this Court or to the taxpayers.

Summary of Argument

The Supreme Court has asserted to legalize murder. The infant victims being killed are entitled by the U.S. Constitution to have

counsel to represent them who has authority to cross-examine the evidence in Roe v Wade, which the Court used to condemn the victims to death, and to present evidence on their behalf to establish their constitutional right to life.

The amicus curiae brief by the Legal Defense Fund For Unborn Children filed herein is incorporated in this motion by reference.

It can not be pretended that it is any longer the governemnt of the United States, or any government of constitution and laws, where judges can Hitler-like assert to legalize murder, but refuse to allow counsel to represent the victims being killed and defend their right to life.

Counsel presents the following evidence in support of the motion to allow counsel to especially represent the victims being killed by Roe v Wade.

ARGUMENT

ROE v WADE MUST BE OVERRULED SINCE THE COURT HITLER-LIKE ASSERTED TO LEGALIZE KILLINGS DEFINED AS MURDER SINCE LONG BEFORE THE ADOPTION OF THE FOURTEENTH AMENDMENT

Counsel presents new evidence herein,[1/] not presented by the parties, to show that many of the killings that the Supreme Court asser-

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1./ The new evidence was published in The Washington Post on September 12, 1979, under the caption "WASHINGTON LAWYER CHARGES U.S. SUPREME COURT WITH MASS MURDER," as set out below. That the charging evidence can be published in the dominant newspaper in the nation's capital, but, as the victims are being killed, the evidence can not even be heard in this Court, proves the complete criminal degeneracy of the legal system. The newly discovered evidence shows the Court asserted to legalize killings defined as murder since before the adoption of the 14th Amendment.

SUMMARY OF ARGUMENT

MANY ROE v WADE KILLINGS ARE MURDER

The evidence will show that many of the killings permitted by Roe v Wade, 410 US 113(1973) were murder in 1868. Since the killings were murder in 1868, then absent a constitutional amendment, the killings are still murder, and Roe v Wade is not law at all.

ARGUMENT

1. Introduction to Evidence

The evidence presented herein will show that, at the time the Fourteenth Amendment was adopted in 1868, the unlawful killing, with malice aforethought, of a child born alive was murder. Killings of children born alive were not treated as a special category, as was abortion.

It is thus absolutely indispensable to examine what "born alive" meant in 1868. It is obvious that, if the life of a child born alive was protected by

ted to legalize in Roe v Wade, 410 US 113, had thereto been defined as murder. It is just as if the Court asserted a right to kill Jews. Obviously, absent a constitutional amendment, these killings are still murder. Justices who have presumed to permit these killings may now be facing the death penalty in very many states.

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the murder laws in 1868, then it is a person within the language and meaning of the Fourteenth Amendment.

The evidence shows that in 1868, born alive did not mean natural birth after nine full months of gestation; nor did it mean birth after viability("that is, potentially able to live outside the mother's womb, albeit with artificial aid." Roe v Wade, 410 US at 160. If abortion resulted in a live but unviable child that died as a consequence of its not being able to survive outside the womb, it was murder and punishable by the death penalty.

The evidence shows that the hysterotomy is a common method of performing abortions under Roe v Wade.This is essentially a Caesarean in which a live but unviable child is removed from the womb and left to die. The legal authorities show that in 1868, such a killing was murder, and punishable by the death sentence.

In summary, what was murder in 1868, can not now be decreed a constitutional right. Without an amendment to the Constitution, the killings must still be murder, and the Justices who permitted these killings may be guilty of mass murder in the first degree. This is still punishable by the death sentence in many states.

Many people would no doubt be astonished to learn that the case presented herein for the unborn is the very case they would have to present for themselves if their right to life were challenged. For example, take almost any group of persons, such as the insane, invalids, Jews or Catholics. Suppose it were claimed in federal court that the

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2. The English Law

The English law, as reflected in the writings of Coke(3 Inst. 50), Hawkins(1 Hawkins Ch. 13, s. 16) and Blackstone(4 Bl. Com. 198) defined the felonious killing of a child "born alive" as murder, even if the child received the fatal wound in the womb.

These authorities were followed by the English courts in permitting prosecutions of the killings of children born alive as murder. Rex v Senior, 1 Moody CC 346 (1832); Reg. v Trilloe, 174 Eng. Rep. 674 (1842); Reg. v West, 2 C & K 784 (1848).

Most critically, in the English law, a child did not have to be viable to be born alive. In 1848, the leading case of Regina v West, 2 C & K 784, was decided. The indictment for murder alleged that the defendant had inserted a "certain pin" "upward into the womb " of a pregnant woman for the purpose of producing the abortion of a "quick" child; and that this resulted in the child being "prematurely born and brought forth alive from and out of the womb." Id., 784-85. The child died shortly thereafter. A "medical witness" had testified that:

"(I)t was a healthy child; but that, being born at that period of gestation, it was impossible that it could live any considerable length of time separated from the womb of the mother. It was incapable

right of "privacy" announced in Roe v Wade includes the right to kill members of these groups, as well as the unborn. If the burden were suddenly thrust on these groups, as it was thrust on the unborn, to prove that they are persons whose lives are protected by the Fourteenth Amendment, what factual, non-argumentative evidence could they find to estab-

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of maintaining a separate and independent existence." Id., at 786.

The judge, relying on Coke and Blackstone, instructed the jury:

"The prisoner is charged with murder; and the means stated are, that the prisoner caused the premature delivery of the witness, Hensen, by using some instrument for the purpose of procuring abortion; and that the child so prematurely born was, in consequence of its premature birth, so weak that it died. .... I am of opinion(and I direct you in point of law), that if a person intending to procure abortion does an act which causes a child to be born so much earlier than the natural time, that it is born in a state much less capable of living, and afterwards dies in consequence of its exposure to the external world, the person who by her misconduct so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder." Id., at 788.

The case of Regina v West, supra, was presented by the leading English writers as the correct statement of the law of murder. See, e.g., 1 J.F. Archbold, A Complete Treatise on Criminal Procedure, Pleading and Evidence 783 (Waterman Am. ed. 7th ed. 1860); 1 W.O. Russell, A Treatise on Crimes and Misdemeanors 671-672 (4th ed. 1865); A.S. Taylor, A

lish their right to life?

As the case of the unborn shows, it would do no good to object that no one ever heard of such a constitutional right to kill, or to object that such killings had thereto been defined as criminal. And the Fourteenth Amendment merely states that it pro-

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Manual of Medical Jurisprudence 516(Penrose Am. ed. 6th ed. 1866). Consequently, the abortion of a quick but unviable child that resulted in the child being born alive so prematurely that its death was caused by its inability to survive outside the womb, was murder.

3. The American Law Of Murder in 1868.

The English common law of murder of children born alive is significant since American courts used the English common law to construe their murder statutes. Clarke v State, 117 Ala. 1(1898); Hamilton v United States, 26 App. D.C. 382(1905).

American courts cited Coke, Hawkins, Blackstone, and the English court decisions, as authoritative definitions on the law of homicide of children born alive. See, e.g., Clarke v. State, 117 Ala. 1(1898); State v Winthrop, 43 Iowa 519(1876). By 1868, leading American legal authorities had specifically cited Regina v West, supra, as the correct law of murder of a child born alive. (As already noted, that case held that if a criminal abortion resulted in the premature delivery of a quick but unviable child that died after delivery as a consequence of its being so prematurely delivered that it could not survive outside the womb, it was murder.) See, e.g., F. Wharton, A Treatise on the Law of Homicide in the United States 96-97(1855). By 1868, this appears to be the uncontradicted view.

tects life of "any person." So, as with the unborn, the Amendment does not expressly refer to the insane, or invalids, or Jews, or Catholics; and its legislative history does not appear to specifically refer to any of these groups. As with the unborn, the murder laws do not expressly refer to the insane,

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Consequently, the evidence shows that the life of a quick but unviable child born alive was protected by the murder laws in 1868.

4. The Law Of Murder In 1868 And The Fourteenth Amendment

Since the evidence shows that the life of a quick but unviable child was protected by the murder laws in 1868, the evidence likewise establishes that the child so born alive is a person within the language and meaning of the Fourteenth Amendment.

By seizing upon viability, Roe v Wade permits the killings of quick but inviable children born alive. The Supreme Court presumed to decree the killings of these children to be a constitutional right without any examination whatever to see if these children were persons within the language and meaning of the Fourteenth Amendment. It is a naked decree without any investigation into the law of murder of children born alive.

This raises the question,- Does the Supreme Court have the Hitler-like power to decree murder to be a constitutional right? If invalids were protected by the murder laws in 1868, can the Supreme Court, without evidence or investigation, decree a constitutional right to kill invalids? If Jews were protected by the murder laws in 1868, can the Supreme Court decree, without evidence or investigation, a constitutional

or invalids, or Jews, or Catholics; and their legislative histories, to the extent they have any, do not appear to specifically refer to any of these groups. The principle in the Declaration of Independence, that all people are "created" equal and endowed with an unalienable right to "life," having been

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right to kill Jews? If newspaper editors were protected by the murder laws in 1868, can the Supreme Court, without evidence or investigation, decree a constitutional right to kill newspaper editors?

No doubt the Supreme Court bears the burden of proving, by evidence so conclusive that it will not admit of a rational doubt, that it possesses the power to decree murder to be a constitutional right.

5. The Hysterotomy Abortion Under Roe v Wade

A common way to perform abortions under Roe v Wade is by hysterotomy. See, Commonwealth v. Edelin, 359 NE 2d 4(Mass. 1976). A hysterotomy is essentially a Caesarean, in which a live but unviable child is removed from the womb and left to die. 1 Hearings Before the Subcommittee On Civil And Constitutional Rights Of the Committee of the Judiciary, House of Representatives On Proposed Constitutional Amendments on Abortion 397 (94th Cong., 2nd Sess. 1976).

As established by medical testimony during the 1976 House Abortion Hearings, "With few exceptions, babies aborted by this method will all move, will all breathe, and some will cry .... Almost all were born alive." Id., at 397.

Consequently, by definition, in 1868, these hysterotomy abortions could have been prosecuted as murder.

sneered out of court in the unborn's case, now provides no assurance for anyone. So what factual, non-argumentative evidence is there for members of these groups to protect themselves from extermination?

The case presented herein for the unborn,

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6. Roe v Wade and Mistake of Law

The Supreme Court itself has recognized that constitutional provisions against ex post facto laws do not apply to judicial decisions that are a mistake of law. Ross v Oregon, 227 US 150(1913). Consequently, if Roe v Wade is a mistake of law, then mass murder is being perpetrated in America. The Roe v Wade hysterotomy killings, by definition under the common law, and thus constitutional law, violate the positive criminal murder statutes throughout the United States.

The killings of children born alive have been prosecuted as murder in the first degree, Comm. v Harmon, 4 Barr. 269 (Pa. 1846)(child thrown in creek); or murder in the second degree, Clarke v State, 117 Ala. 1 (1898)(wife beaten, child die from injuries); or manslaughter, People v Chavez, 77 Cal. App. 2d 621(1947)(child neglected),- according to the facts of the particular case, as in any other homicide.

In connection with these judicial killings, it is relevant to note that the Supreme Court decreed murder to be a constitutional right without any examination whatever of the law of murder of children born alive. And as Abraham Lincoln noted, "(I)t is an established maxim in morals that he who makes an assertion without knowing whether it is true or false, is guilty of falsehood; and the accidental truth of the assertion, does not justify or excuse him." 1 The Collected Works of Abraham Lincoln 384 (Basler ed. 1953). Since Lincoln's day, this "maxim in morals"

supra note 1, is thus the case for everyone else. The common law is the dictionary; it has traditionally been used to define the terms of the homicide statutes. It is this same body of factual evidence upon which all groups must ultimately rely to establish

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has also been a textbook definition of perjury. See, 3 Wharton's Criminal Law and Procedure, § 1308, p. 673 (12th ed. 1957).

Consequently, rational people are entitled to believe, and a jury may be permitted to find, that the process by which the Supreme Court decreed murder to be a constitutional right is perjury or criminal fraud. It seems reasonable that such judicial killings, after such prolonged deliberation and adherence, could be prosecuted as murder in the first degree. Many states still punish mass murder in the first degree with the death sentence.

It may be that the judges responsible for the judicial killings did not believe that they were breaking the law. But, as Justice Oliver Wendell Holmes once wrote, "Ignorance of the law is no excuse for breaking it." "It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but ... the lawmaker has determined to make men know and obey." Holmes, The Common Law 41 (Howe ed. paperback 1963).

It now full well appears that the Justices of the Supreme Court of the United States have presumed to decree murder to be a constitutional right, without any evidence or examination whatsoever, with the death penalty the possible consequence of their decision being a mistake of law.

It now appears that, unless the Supreme Court can prove by evidence, beyond a doubt based on reason, that it has the Hitler-like power to decree mass

their right to life. The evidence presented herein for the unborn, supra note 1, is absolutely conclusive. It shows, beyond the legal power of any federal judge to deny, that the United States is being ruled over by a Tribunal of murderers who have, Hitler-like, asserted to legalize mass murder.

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murder to be a constitutional right, then Roe v Wade is just such a mistake of law.

CONCLUSION

Is government of laws founded upon evidence, or the mere naked decrees of men holding office for life?

The evidence proffered herein would appear sufficient to permit reasonable people to conclude beyond a reasonable doubt that the Supreme Court of the United States has committed mass murder in the first degree. The evidence would appear sufficient for reasonable to conclude that, upon a scale never seen before in the peacetime history of the world, "The dagger of the assassin was concealed beneath the robe of the jurist." The Justice Case, 3 Trials of War Criminals Before the Nuernberg Military Tribunals 985 (GPO 1951).

If the United States were being ruled over by a Tribunal of Murderers, holding office for life, nakedly decreeing mass murder to be a constitutional right, in open defiance of the evidence, and presuming to be blindly obeyed by all courts, executives legislatures, and people whatever without question, regardless of the evidence, then surely it would be the most astounding event in the legal history of the human race.

Alan Ernest
Counsel

THE VICTIMS BEING KILLED BY ROE v WADE ARE CONSTITUTIONALLY ENTITLED TO BE ESPECIALLY REPRESENTED BY COUNSEL OR GUARDIAN AD LITEM

The evidence shows that the U.S. Supreme Court has Hitler-like asserted to legalize killings defined as murder. The victims, all infants, are entitled by the U.S. Constitution to be especially represented by counsel empowered to defend their right to life under the U.S. Constitution. 2/

It can not be pretended that it is any longer the government of the United States, or any government of constitution and laws, wherein judges assert to legalize murder, but refuse to allow counsel to represent the victims being killed and defend their constitutional right to life.

Alan Ernest
Counsel for Movant

2. Goldberg v. Kelly, 397 U.S. 254, 268-270(1970); In Re Gault, 387 U.S. 1(1967); Morrissey v Brewer, 408 U.S. 471 (1972); Gagnon v. Scarpelli, 411 U.S. 778(1973); Viteck v. Jones, __ U.S. ___, 63 L Ed 2d 552 (1980); Gideon v. Wainwright, 372 U.S. 335 (1963); Douglas v. California, 372 U.S. 353(1963); United States v. Altstoetter(The Justice Case), 3 Trials of War Criminals Before the Nuernberg Military Tribunals 1046 (1951).